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Supreme Court of the United States

October Term, 1962

No. 383

EDWARD CARMINE COPPOLLA
and ALFRED SANANTONIO,
Petitioners,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Edward Carmine Coppolla and Alfred Sanantonio, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 23, 1962.

Citations to Opinions Below

The District Court rendered no "opinion". The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, pp. 1a *et seq.*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (Appendix, *infra*, p. 11a). By order of Honorable John M. Harlan, Circuit Justice, dated August 21,

1962, the time within which to file a petition for a writ of certiorari in this case was extended to and including August 29, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. In a prosecution for substantive offenses and conspiracy to violate 18 U. S. C. §495 by aiding and abetting the forging and uttering of stolen United States Government Bonds, upon an indictment drawn in 538 substantive counts and two conspiracy counts (involving separate conspiracies), the extraordinary number of counts being justified by the Government solely on the basis of the number of individual bonds allegedly forged and uttered, is such indictment abortive and insufficient on its face to charge an offense on the ground of violation of petitioners' right to due process of law?

2. Where the proofs under such indictment ultimately establish (ostensibly) only nine substantive offenses (and no conspiracy offense) involving petitioners, but where petitioners have been obliged to stand trial under the full indictment with all of its 540 counts, and where despite the elimination of the more than five hundred other counts as to petitioners the jury is still permitted to consider all of the evidence introduced in the entire case in passing on the minuscule remainder of counts, is not the due process aggrievement referred to in question No. 1, above, intensified?

3. Where, moreover, the final washing-out of the proofs leaves the Government's evidence in such a posture that the only crimes ostensibly proven against petitioners would have been cognizable only under State law, should not the

indictment be dismissed on grounds of lack of federal jurisdiction; and is not the due process aggrievement still further intensified?

4. In the circumstances recited in the three preceding questions, was it not error to decline to entertain defense motions addressed to the prodigious scope of the indictment as having been waived by reason of untimeliness under F. R. Cr. P., Rule 12; and in any event should not the right of severance have been preserved continuingly once the conspiracy counts were dismissed?

5. Where the proofs show undisputedly (or beyond serious dispute) that at most the petitioners' role was, allegedly, as sellers of stolen United States Government Bonds for a fixed cash consideration, with no shred of evidence of knowledge of the alleged conspiracy to pass the bonds or of any of the details of the alleged scheme, and with no shred of evidence of participation in or encouragement or incitement of the principals in such alleged scheme, was it not error to submit the case to the jury on the theory of aiding and abetting?

6. Was it error to instruct the jury that the alleged accomplice witness Levine, the sole inculpating witness against petitioners, was, in effect, an accomplice as a matter of law? (Not argued in this petition but preserved in the event of the granting of certiorari).

7. The case being one where the uncorroborated testimony of an alleged accomplice witness was the sole inculpating testimony against petitioners, should the prevailing federal rule dispensing with the requirement of corroboration of an accomplice witness be reconsidered and abandoned? (Not argued in this petition but preserved in the event of the granting of certiorari)

Constitutional Provisions, Statutes and Rules Involved

The case involves the Fourteenth Amendment of the Constitution of the United States (due process of law); 18 U. S. C. §495; 18 U. S. C. §2; 18 U. S. C. §371; and F. R. Cr. P., Rules 8, 12 and 14. These provisions are printed in the Appendix, *infra*.

Statement of the Case

Petitioners were convicted in the District Court, after a jury trial, under eighteen Counts of a five hundred and forty count indictment which charged aiding and abetting the forging and uttering of stolen United States Government Bonds in violation of 18 U. S. C. §495 (and see 18 U. S. C. §2). These eighteen conviction counts, in turn, represented merely a doubling of nine forging counts to which were added the respective nine corresponding uttering counts; in fact, even these nine alleged situations are actually reducible to one group of nine bonds belonging to a single person (the so-called Fankuchen bonds, *infra*). The five hundred and forty count indictment is printed at D9a-63a.[1] The judgments of conviction were not printed for the Court below, but they are printed in the Appendix *infra* at pp. 12a-15a, and they appear in the certified copy

[1] "D a" refers to the "Appendix to Appellants' Briefs" (printed) in the Court below, nine copies of which are filed herewith. References herein to "Tr. " are to the typewritten stenographic minutes of the trial in the record on appeal, the pagination used herein being the original stenographer's pagination (the complete original record on appeal is filed herewith). References to " a" herein, *i.e.*, without any prefixed alphabetical designation, are to the printed "Appendix for United States of America" in the Court below, nine copies of which are filed herewith.

of the transcript of record before the Court below at pp. 1370 and 1373. Each of the petitioners was sentenced to eight years on each count, to run concurrently (*ibid*). The petitioners appealed to the Court of Appeals from the respective judgments of conviction (*id*. pp. 1374-1375, 1382-1383). The judgment of the Court of Appeals here sought to be reviewed affirmed the convictions (Appendix, *infra*, p. 11a). Petitioners are free on bail, and the mandate of the Court of Appeals has been stayed, pending the proceedings in this Court.

The Government's theory, under its five hundred and forty count indictment was that the two petitioners herein were prime members of a ring for the wholesale forging and uttering of United States Government "E" Savings Bonds allegedly stolen from various private individuals, and that the forging of each bond, plus the uttering of each bond, constituted a separate offense justifying these extraordinary multiple counts—there being two conspiracy counts (numbers 539 and 540) along with five-hundred and thirty eight substantive counts. The other members of the alleged ring, who were indicted together with the two petitioners herein, were Campisi, Donatiello, Levine, Parks and Bartkovsky. The joinder of offenses and defendants in the five hundred and forty count indictment may be summarized as follows:

[1.] Forgery counts 1 through 156.
and the corresponding
Uttering counts 157 through 312.
Levine
Sanantonio
Coppolla
Donatiello

[2.] Forgery counts 313 through 318
and the corresponding
Uttering counts 319 through 324.
Parks
Sanantonio
Coppolla
Donatiello

[3.] Forgery counts 325 through 329
and the corresponding
Uttering counts 330 through 334.
Sanantonio
Coppolla
Levine
Parks

[4.] Forgery counts 335 through 369
and the corresponding
Uttering counts 370 through 404.
Bartkovsky
Donatiello

[5.] Forgery counts 405 through 471
and the corresponding
Uttering counts 472 through 538.
Bartkovsky
Campisi

[6.] Count 539 (conspiracy)
Sanantonio
Coppolla
Donatiello
Levine
Parks

[7.] Count 540 (conspiracy)
Donatiello
Bartkovsky
Campisi

The above breakdown of the joinder of offenses and defendants shows that the petitioners were named in the first alleged conspiracy with Donatiello, Levine, and Parks (Count 539), but that Donatiello was the only one of the five who was also named in the second alleged conspiracy. As to the substantive counts, not a single one of the five defendants in the first alleged conspiracy was named in a total of one hundred and thirty-four counts (Counts 405 through 538), and only Donatiello was named in an additional seventy counts (Counts 335 through 404). The petitioners were not named in two hundred and four substantive counts (Counts 335 through 538).

Petitioners moved in the District Court for relief addressed to the joinder aspects of the indictment and its overall extraordinary scope (2a-10a).[2] Such relief was denied on the ground that the requests were untimely and that the objections had therefore been waived under Rule 12, F. R. Cr. P. (*ibid*). However, the District Court reproved the Government, in extremely strong language, for bringing on such an indictment.[3] Subsequently, during the trial, the District Court again excoriated the Government for the size of the indictment, terming it "an abortion", and warning that he was going to inform the Attorney General

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[2] As explained in fn. 1, *supra*, this refers to the Government's printed Appendix in the Court below.

[3] The District Court called the indictment "amazing" (4a), demanded to know "what it is all about", "a 540 Count indictment", "Why are there two conspiracies here" (*ibid.*), "these 540 Counts are ridiculous Counts" (9a), "I have expressed myself in no uncertain terms to the United States Attorney on that" (*ibid.*). Another District Judge, to whose attention the same indictment had come on an earlier date, when told that the indictment contained 540 Counts, exclaimed, "Who perpetrated that monstrosity in this case?" (R. 1408—stenographic transcript of proceedings of November 22, 1961, p. 2).

about this "crazy * * * numbers game of large numbers of counts in indictments, * * * and if this goes on any more they better send somebody up here to take over the United States Attorney's office. It's ridiculous. * * * *" (198a-199a). Similarly, during the course of the trial, the District Court exclaimed, "If the jury can follow it they are better than I am. * * * *" (Tr. 560). On another occasion during the trial the District Court said, "It gets more like Alice in Wonderland every minute" (212a). Notwithstanding all of these scathing criticisms of the indictment, the District Court permitted the trial to proceed on the entire five hundred and forty counts, seemingly in the belief that "It seems to me that if they [the prosecution] want to do it there is nothing I can do about it" (Tr. 855).[4] (As recited *infra*, the District Court did finally induce the Government to cut down the number of counts for submission to the jury, but to a large extent this was necessitated anyhow by failures of proof (especially as to the two petitioners herein); and it did not result in taking away from the jury any of the evidence as to the cases against the two petitioners with respect to any of the thus ultimately omitted counts.)

The trial of this indictment proceeded against only four of the original seven defendants, because Levine, Parks and Bartkovsky pleaded guilty before the trial began; this left the two petitioners, and Campisi and Donatiello. The prosecutor announced in his opening that as against these four defendants "we are going to prove each and every count of this indictment, both the conspiracies and the forging and uttering" (D88a). The Government's theory

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[4] Petitioners of course hope that there is something which this Court can do about it.

was that the petitioners were the suppliers of the stolen bonds under all of the first three hundred and thirty four counts of the indictment, that their alleged supplying of these bonds was to Donatiello primarily and in a few instances directly to Levine, and that Donatiello in turn supplied these bonds to Levine who was to cash them; also, that Levine in turn supplied some of the bonds to Parks to be cashed by the latter. The remaining forgery and uttering Counts (numbers 335 through 538) were theorized by the Government as having involved Donatiello or Campisi as suppliers of the bonds, and Bartkovsky as the passer. The use of two separate conspiracy Counts was justified by the Government on the basis of the aforementioned breakdown as between the two sets of substantive Counts (i. e. those involving and those not involving the petitioners herein as alleged suppliers); and the joining of the two conspiracy counts was justified by the Government on the basis that Donatiello was some kind of link between the two conspiracies.

The principal difficulty for the Government in the actual development of the proof at the trial turned out to be that the petitioners herein, instead of being involved as charged in the supplying of bonds under all of the first 334 counts (or 167 forging counts plus 167 uttering counts), were allegedly linked by the proofs to only 18 of those counts (9 forging plus 9 uttering counts). The Government conceded that its case against petitioners as to all of the other counts had not developed (Tr. 813-814). This meant that the entire host of alleged forgings and utterings committed by other defendants prior to around the end of November, 1960 were not connected up with the petitioners. Indeed, it was undisputedly evident from the Government's proofs that the other defendants, especially Donatiello and

Levine, if guilty, had operated the alleged ring absolutely without any participation of any kind by the petitioners herein for a period of nearly six months in 1960 and, the undisputed indications in fact were that at least Levine (one of the defendants who pleaded guilty) was involved in either this alleged ring or a predecessor one much earlier in 1960 and perhaps in 1959.

The nine forging counts (with their nine corresponding uttering counts) which were the only substantive counts submitted to the jury against the two petitioners herein, related to bonds which the petitioners allegedly supplied to Donatiello and Levine or to Levine alone between late November 1960 and early January 1961 (Counts 153 to 156, inclusive; 309 to 312, inclusive; 325 to 334, inclusive). The sole testimony implicating the petitioners under these counts came from the alleged accomplice witness Levine. Levine's testimony was to the effect that he and Donatiello visited the petitioners a number of times during the second half of 1960 to try to buy bonds from them, that the petitioners at last told Levine and Donatiello that some bonds were expected, that late in November, 1960, some bonds in the name of a Dr. Fankuchen were sold by petitioners to Levine and Donatiello for some money then and there paid (the amount of which Levine did not know), and that on three subsequent occasions in late 1960 or early 1961 additional Fankuchen bonds were sold by petitioners to Donatiello and Levine or to Levine alone, money of an amount unknown to Levine being paid on each of these occasions—on the last occasion Levine paid some money and was to pay the rest in a few days (66a-75a, 79a-83a, 87a-88a, 91a-95a, 97a-103a, 106a-113a; D96a-102a; Tr. 288-316, 324-330, 397).

The above described testimony of Levine, it is to be noted, was the sole proof for the Government in support of its charges of aiding and abetting in this case by the two petitioners herein. It was also the sole proof in support of the charges under the conspiracy Count which named the petitioners (Count 539). In any event, however, the conspiracy counts were not submitted to the jury (Tr. 1002-1003), and the case therefore went to the jury against the petitioners solely on the above mentioned substantive counts (*ibid*).

But, as previously mentioned, the Court let the jury consider all of the evidence which had been introduced by the Government on all of the original 540 counts of the incident (D160a-161a, 165a, 182a-183a; Tr. 182a-183a). The reasons why the District Court took this action were never explicitly stated by the Court in a systematic way, but it would appear that, since the case against all four of the defendants who were on trial was being submitted to the jury, and since this in the Court's view entailed in one way or another leaving in all of the evidence, the jury would have to be allowed to consider all of the evidence, under general precautions from the Court as to segregation of the respective portions of the evidence in relation to each defendant and in relation to the respective counts which remained in the case as to each defendant (e.g., 238a-240a; Tr. 867-868, 1000-1003). Even all of the evidence which had been received solely as being admissible under the dismissed conspiracy counts was left in the case to be considered by the jury (e.g., D160a-161a), apparently because the dismissal of the conspiracy counts was ordered only on the theory that the Court deemed them superfluous in view of the aiding and abetting nature of all of the substantive

counts (238a-240a; Tr. 867-868, 1000-1003). The defense repeatedly objected and took exceptions to the leaving in of all of this evidence (see testimony cited in preceding references in this paragraph).

Thanks to the leaving in of all of this evidence, the jury case against the petitioners was allowed to include a heterogeneous mass of inflammatory, guilt-associative evidence emanating the aura of a conspiratorial "ring"—a "ring" with which the evidence under the relevant remaining counts against the petitioners did not actually link them in any way except in regard to the brief isolated Fankuchen bond transactions of late 1961. This conspiratorial aura included, *inter alia*, voluminous testimony as to sensational burglaries of bonds with which the petitioners were never connected (e.g. 27a, 32a, 38a, 55a-57a, 156a-158a, 162a-163a; Tr. 476-541—see defense objections, e.g., 33a, 45a-57a), the forging and cashing of literally hundreds of bonds with which the petitioners were never connected (and by persons with whom they were never connected) (see testimony of Levine, cited *supra*; Parks, 127a et seq., Barthovsky, 177a et seq.), and lurid details as to the elaborate stratagems used in cashing all of the bonds even though it was undisputed that the petitioners were never involved in such stratagems or in the cashing of any of the bonds and had at most sold nine bonds to Donatiello or Levine on an outright buy and sell basis (Levine, Parks, Bartkovsky, *supra*).

In the Court of Appeals petitioners urged that it had been unjust to try them under this 540 count indictment instead of severing their cases for separate trial; that the crime of aiding and abetting had not been proved in view of the Government's failure to prove anything more than that petitioners had sold bonds outright to Donatiello or

Levine; and that petitioners had been prejudiced by the Trial Court's allowing the jury to consider all of the evidence in the case after virtually all of the counts including the conspiracy counts had been eliminated as against the petitioners. The Court of Appeals declined to reach the argument addressed to the size of the indictment on the ground that the record showed a waiver under Rule 12. It held that the evidence was sufficient to convict the petitioners of aiding and abetting because possession of the bonds by petitioners was unlawful, there was an element of "clandestine selling," and there was "the implicit conditioning of future business of the same nature and at least part payment for past transactions on successful passing"; and that these circumstances "furnished the required 'stake in the success of the venture'" contemplated by *United States v. Falcone*, 109 F.2d 579 (C.C.A. 2), aff'd 311 U. S. 205. (Appendix, *infra*, pp. 6a et seq.) The Court of Appeals also held that "since the conspiracy counts were amply proved and were dismissed only to simplify the issues, the declarations of the co-conspirators were admissible"; and that "it was not error to send to the jury the bonds that were the subject of counts that were later dismissed because no motion to strike them was made" (Appendix *infra*, p. 10a).[5]

Reasons for Granting the Writ

1. In their overall impingement upon the rights of the petitioners herein, the prosecutive devices used in this case and the failure of the Trial Court to stay the Government's hand, present a situation of outstanding im-

[5] Petitioners (defendants) repeatedly objected to the retention of this evidence (*supra*).

portance for this Court's intercession in the interests of the fair and rational administration of federal criminal justice. The first of the District Judges who had occasion to encounter this indictment termed it a "monstrosity"; a like imagery ("an abortion") was suggested by the Trial Judge himself. For a case which, when washed down to its ultimate maximum proportions, ended up involving a brief series of a few bond sales by petitioners allegedly totalling nine bonds in all (and deriving from one single alleged theft), the Government blazoned its way, from the Grand Jury stage onward and down through the Trial Jury's conclusion of its deliberations, with this stupefying aggregation of 538 substantive counts and two conspiracy counts, which latter in turn were so incomprehensibly interwoven with the aiding and abetting aspects of the substantive counts that the Trial Judge himself, not to say the jury, never achieved a rational mastery of the factual issues and the proofs. In addition to the instances in the record previously cited which evinced the Trial Court's dismay (and the prosecution's own confusion) over the labyrinthine posture of the charges and the proofs see, e.g. 205a-213a, 237a-238a; Tr. 667-668, 813-814, 845-847, 1148-1149; D158a, 160a-161a; even after the Trial Judge had dismissed the conspiracy counts he at one point apparently forgot that he had done so and was on the point of admitting additional evidence on the conspiracy theory (Tr. 1148-1149). The dismissal of all but a tiny fraction of the counts as against these petitioners did not relieve the situation, of course, because, as seen, all of the evidence stayed in the case as submitted to the jury.

The Government's reasons for wanting the indictment drawn and the case tried in this way are not difficult to

surmise. Conspiracy, the "prosecutor's darling", was of course to be expected here. But by the intermingling of conspiracy with aiding and abetting, and by the mountainous piling up of hundreds upon hundreds of substantive counts ostensibly cementing together what ultimately turned out to be the quite distinct segments of defendants' alleged criminal activities, the Government in this case forged a prosecutive weapon that could fail of its blunderbuss targets only if the Courts interfered as a matter of law and procedural justice. And, we may further surmise, there was an even deeper reason why the Government wanted it this way with particular regard to the cases of petitioners Coppolla and Santantonio: As it turned out, a serious issue was presented in terms of the law of aiding and abetting (*infra*) as to whether federal jurisdiction existed at all to indict and try these petitioners, or whether their alleged offenses were cognizable solely by the state prosecutive authorities. There is apparently no federal statute which makes it a crime merely to possess or to sell stolen United States Government Bonds absent the interstate commerce jurisdiction—it is undisputed that the few substantive counts submitted to the jury as against the petitioners herein involved purely intrastate features.

Thus, the Government was guilty in this case not only of grossly overreaching methods of prosecution for supposed *federal* crimes, but it contrived an outright arrogation of jurisdiction as to a matter which fell within the purview of the State of New York (if anywhere). Seldom if ever, we venture to say, has a prosecutive scheme combined so many elements of procedural *ultra vires*, lack of jurisdiction of the subject matter, and downright constitutional impropriety.

What of the determination by both of the Courts below that the questions raised concerning the joinder aspects and the scope of the indictment were waived by reason of the assertedly acknowledged untimeliness of the defense motions addressed thereto? First, we earnestly ask this Court to read the pertinent portion of the Trial Minutes (2a-10a), where, we submit, it appears far from unambiguously that the defense acknowledged any such waiver. Second, in any event, if we are correct in our formulation of the points here in question as partaking of the quality of subject-matter jurisdiction and due process constitutionality, the defense motions were not ones that could be waived in the manner asserted by the Courts below but were in the nature of motions addressed to the sufficiency of the indictment to state an offense and could therefore be made at any time under Rule 12.

We acknowledge that we have found no case dealing with the precise combination of issues presented by the form of the present indictment and the trial consequences thereof in this case. However, we think that on the score of the prodigiously multiple counts alone, this Court's decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U. S. 218 points to the unacceptability, in principle, of indictments of this portentously over-aweing type which cannot be effectively handled by a jury or fairly defended against by accused persons. In the very few cases we have found where objections against such indictments have been made on due process grounds, the denial of such constitutional objections occurred with respect to indictments which contained not remotely so many counts as this one, and without the presence of the other aggrieving

factors which exist in this case. E.g., *People* v. *Allen*, 352 Ill. 262, 185 N. E. 685 (1933) (16 Counts).

2. Even apart from the points above mentioned as to the due process and subject-matter jurisdiction aspects of the situation, the case is appropriate for certiorari on the issue of misjoinder and rights of severance in view of the dismissal of the conspiracy counts. Cf. *Schaffer* v. *United States*, 362 U. S. 511, 516. True, the Trial Court herein apparently dismissed the conspiracy counts primarily for purposes of simplification (deeming them unnecessarily duplicative of the aiding-and-abetting charges in the substantive counts), rather than on an express basis of failure of proof; this was emphasized by the Court of Appeals (Appendix, *infra*, p. 9a). However, we think it would be demonstrable in the more ample space allowed in a brief on the merits that the correct ruling of the Trial Court on the conspiracy count affecting the petitioners (Count 539) would have been to dismiss them for failure of proof. Indeed, if this Court should find indicatively meritorious our discussion *infra* of the legal sufficiency of the proofs on aiding and abetting, we believe the conclusion would follow that the Government's conspiracy proofs in this case failed with respect to these petitioners. There is not one word in the record to support the inference that the petitioners knew of a *conspiracy* among Donatiello, Levine and Parks to conduct the alleged scheme of the latter three individuals for the forging and uttering of the bonds, much less that the petitioners knew of any of the alleged details of that alleged scheme or of how it had been carried out in the past or might be carried out in the future. *A fortiori*, as we show *infra*, the petitioners did not *join* any such alleged conspiracy or participate therein or aid it in any way as

conspirators; on this too there is no proof whatsoever in the record. Therefore, under the rule of the *Schaffer* case, *supra*, the Trial Judge had "a continuing duty * * * to grant a severance if prejudice does appear". Against the background in recent decades of the distressing deterioration of standards of fair trial and fair proof in federal prosecutions where the Government resorts to the conspiracy dragnet, the presentation upon the instant record of the aforementioned issue which this Court so recently revitalized in the *Schaffer* case, and in view also of the total circumstances of the Government's overreaching prosecutive procedures in this case, we submit that the *Schaffer* issue alone, without more, merits the granting of the writ in this case for the sake of preserving the fair administration of federal criminal justice.

3. *United States* v. *Falcone*, 311 U. S. 205, and *Direct Sales Co.* v. *United States*, 319 U. S. 703, are the well known statements by this Court of the tests of federal criminality of sales to an illegal enterprise under a prosecution for conspiracy or aiding and abetting. *Falcone*, which involved sales of sugar to illegal distillers, insists upon the seller's knowledge of the conspiracy in which the buyer was allegedly engaged. *Direct Sales Co.*, which involved narcotics, laid stress upon the nature of the article sold, but it preserved the *Falcone* requirement of knowledge of the conspiracy and it conceded also that not every instance of sale of harmful or illicit goods will support a charge of conspiracy, stating specifically that "There may be also a fairly broad latitude of immunity for a more continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active

incitement to purchase" (319 U. S. at p. 712, fn. 8). As appears from the cases mentioned *infra*, the conspiracy doctrines of *Falcone* and *Direct Sales Co.* have permeated (albeit quite non-uniformly) the subsequent stream of case law in the lower federal courts in regard to aiding and abetting, even though it would seem that situations of the latter class call for an even more restrictive rule in favor of defendants since the crime of aiding and abetting requires that the principal offense be actually effected whereas conspiracy, of course, is complete upon the mere making of the conspiratorial agreement subject only to the overt act requirement. (The subsequent judicial history of *Falcone* and *Direct Sales Co.* is resumed *infra*.)

We think we may say it is undisputed, or at least not seriously disputed, that the sole relevant testimony of alleged aiding and abetting in this case regarding the petitioners herein goes no farther than the following (*per* the accomplice witness Levine): The defendants Levine and Donatiello visited one or both of the petitioners an unspecified number of times during the second half of 1960, it being Levine's impression that the purpose of these visits was for Levine and Donatiello to try to purchase stolen United States Government Bonds from one or both of the petitioners. Late in November, 1960, one or both of the petitioners for the first time said some bonds would be available shortly. Later in November, 1960, and three subsequent times thereafter up to early January, 1961, one or both of the petitioners sold to Donatiello and Levine, or to Levine alone, bonds which were in the name of Faukuchen. These sales were paid for in money on each of the four occasions mentioned, except that on the last occasion, involving Levine and petitioner Coppolla alone, Levine did not have the entire amount of the purchase price and was

to bring it within a few days. On one occasion Donatiello complained to Levine that "Freddie" (apparently referring to Sanantonio) would not sell them bonds when they did not have the cash to pay for them. There is not one shred of testimony that the petitioners or either of them knew of the Donatiello-Levine-Parks scheme for disposing of the bonds or that they knew any of the details thereof; or that they participated in such schemes; or that they assisted it in any manner whatsoever except insofar as their alleged supplying of the bonds to Donatiello or Levine might be deemed to have the effect of such participation or assistance.

These undisputed (or not seriously disputed) facts establish, we submit, that the only conceivable crime with which the petitioners herein were chargeable would have been the crime of possession or sale of stolen securities under the law of the State of New York—as we suggested *supra*. We submit that there is nothing in this factual picture that could possibly form the basis for submission to a federal jury of the charge of aiding and abetting a violation of 18 U. S. C. § 495—or a charge of violating any other federal statute. There is not present in this scene either the knowledge of conspiracy required by the *Falcone* case, *supra* (indeed there is not even present in this case any longer the charge of conspiracy), nor is the test of *Direct Sales Co.* met as to "a. * * * continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase".

However, the inquiry as to the appropriateness of certiorari in these circumstances is not terminated by a consideration of *Falcone* and *Direct Sales Co.* alone. The pre-

viously referred to subsequent judicial history of those decisions strongly enhances the appropriateness of certiorari, because those two decisions, which stand as this Court's most recent guidance on the subject to the lower federal courts, have been the subject of a notably disparate and confused (and numerous) series of interpretations in the various Circuits. As was said by Circuit Judge Sibley, for the Court, in *Johns* v. *United States*, 195 F. 2d 77, 79 (C. A. 5 1952), referring to this precise question, "It would be tedious and unprofitable to review the cases and attempt to distinguish or reconcile them". An idea of the extent of the judicial ferment among the Circuits on this subject to which Judge Sibley was referring may be gained from the *Note* in 53 Col. L. Rev. 228 (1953), entitled *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*. Cases illustrating the ferment since this 1953 *Note* was published are: *Riggs* v. *United States*, 280 F. 2d 750 (C. A. 5 1960) (recognizing that even in the sale of counterfeit currency more than a mere sale or transfer is seemingly required); *United States* v. *Carlucci*, 288 F. 2d 691 (C. A. 3 1961) (involving firearms stolen from the Federal Government and resting the decision on the presence in the record of specific evidence of active participation by the seller in the buyers' criminal enterprise); *Jones* v. *United States*, 251 F. 2d 288 (C. A. 10 1958), cert. den. 78 S. Ct. 703 (reversing a conspiracy conviction as against a Missouri liquor dealer who sold large quantities of liquor to other defendants who he knew were involved in sales in Oklahoma, a dry State, the conspiracy charged being one to violate federal law by importing liquor into Oklahoma); *Quirk* v. *United States*, 250 F. 2d 909 (C. A. 1 1957), cert. den. 78 S. Ct. 669 (noting the existence of circumstances of actual participation by pre-arrangement in the substantive

crime charged); *Ritter* v. *United States*, 230 F. 2d 324 (C. A. 10 1956) (similar to case last cited); *Bartoli* v. *United States*, 192 F. 2d 130 (C. A. 4 1951) (a counterfeit money case resting decision partly upon evidence of direct participation in the ultimate illicit scheme); *Johns* v. *United States*, 195 F. 2d 77 (C. A. 5 1952) (applying Judge Learned Hand's decision in the *Falcone* case, 109 F. 2d 579, as to the rule concerning the accused's "stake in the venture"). For significant examples of the earlier cases where no conspiracy or aiding or abetting was found, see the previously cited Note in 53 Col. L. Rev. 228, at p. 236, fn. 44. The decision here sought to be reviewed is difficult to reconcile with the foregoing.

The Court below, we submit, has taken a simplistic view both of the law and the facts in concluding that the charge of aiding and abetting was proved on the instant record. It nowhere implements its factual assertion that the petitioners committed any acts looking to an "implicit conditioning of future business of the same nature and at least part payment for past transactions on successful passing" (Appendix *infra*, p. 6a). Its Draconic application of *Falcone* and *Direct Sales Co.* adds nothing to the federal jurisprudence of this subject except further uncertainty and disparity of doctrine among the Circuits.

This branch of Federal criminal prosecution is of sufficient importance, we submit, in view of its potential oppressiveness as so strikingly illustrated in this case, to justify this Court in taking the matter up on certiorari for the purpose of laying down new guidelines for the Circuits in face of the disorganized results among the Circuits since the decisions in *Falcone* and *Direct Sales Co.* were handed down some twenty years ago.

Conclusion

For all of the foregoing reasons a writ of certiorari should issue in this case. The decision below should not be permitted to stand as a guide for future federal criminal trials.

Respectfully submitted,

Jerome Lewis
Attorney for petitioners
66 Court Street
Brooklyn, New York

APPENDIX A

Opinion—United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 371—September Term, 1961.

(Argued June 13, 1962 Decided July 23, 1962.)

Docket No. 27447

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CAMPISI, EDWARD CARMINE COPPOLLA, ANTHONY J. DONATIELLO and ALFRED SANATONIO,

Appellants.

Before:

FRIENDLY, KAUFMAN and HAYS,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, entered upon the verdict of a jury, convicting appellants of violations of 18 U. S. C. §§495, 2. Affirmed.

SHELDON H. ELSEN, Assistant United States Attorney, New York, New York (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Arnold N. Enker, Thomas F. Shea, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

SAMUEL D. BOZZA, Newark, New Jersey, *for Appellant Campisi.*

DAVID MARKOWITZ, New York, New York, *for Appellant Coppolla.*

MICHAEL A. QUERQUES, Orange, New Jersey, *for Appellant Donatiello.*

MICHAEL P. DIRENZO, New York, New York, *for Appellant Sanantonio.*

HAYS, *Circuit Judge*:

Appellants appeal from their convictions of aiding and abetting the crime of forging and uttering stolen United States Government bonds in violation of 18 U. S. C. §495. See 18 U. S. C. §2. We affirm all the convictions.

In addition to the appellants, Herbert Levine, Meyer Parks and Thomas Bartkovsky, were indicted as co-defendants. They pleaded guilty and testified for the government.

On the basis of the evidence introduced by the government, the jury could find the following facts: The bonds that were the subject of the indictment were stolen from the homes and offices of a series of private persons. They were cashed between May, 1960 and January, 1961, mainly in banks located in small towns, by persons who posed as the registered owners. Sanantonio and Coppolla sold stolen bonds to Donatiello, Campisi and, for a short period, Levine, for an agreed percentage of the face value of the bonds. Although payment to them for the bonds was not expressly conditioned on the successful negotiation of the bonds,

some, at least, of the bonds were sold on credit. (The credit aspect of the transaction suggests that if the bonds could not be resold Sanantonio and Coppolla would not be paid.) Campisi, Donatiello and Levine relied on passers to resell the bonds and worked closely with the passers, Parks, Bartkovsky and, at one time Levine, to achieve this end. Donatiello and Campisi would supply the passers with bonds and with blank drivers' licenses on which validating stamps had been forged. Each passer inserted his own physical characteristics and signed the name of the registered owner of the bond. The passers and the middleman would drive to a town in which they were not known and select a local address and enter it on the license. The passer would then go to a local bank, forge the endorsements and present the stolen bonds for payment, using the driver's license as identification. Immediately after leaving the bank the passer would turn the proceeds over to the middleman and receive an agreed upon percentage.

None of the appellants challenges the sufficiency of the evidence to establish these facts and his own role in the general scheme. Levine and Parks testified that they passed stolen bonds for appellant Donatiello and described in detail the circumstances of the transactions. Bartkovsky gave similar testimony with respect to Campisi. Levine testified that Sanantonio delivered a large amount of bonds to him or Donatiello in the presence of Coppolla and that the price was fixed in conversation between Sanatonio and Coppolla on the one hand and Levine and Donatiello on the other. Levine testified that, at a later date, Coppolla and Sanantonio delivered $20,000 worth of stolen bonds to him and

Donatiello for which they received immediate payment. Subsequently, Coppolla sold Levine additional bonds, in one instance after Levine made the initial contact through Sanantonio.

The first question presented by appellants Coppolla and Sanantonio is whether the evidence sufficiently connects them with the substantive crime to support a charge of aiding and abetting. 18 U. S. C. §2. They argue that they merely sold the stolen bonds to Campisi, Donatiello and Levine for an established price and were not concerned with the success or failure of subsequent attempts to pass the bonds unlawfully. In support of the proposition that this conduct does not amount to a sufficient "stake in the venture" to support the charge, they cite *United States* v. *Falcone*, 109 F. 2d 579 (2d Cir.), aff'd, 311 U. S. 205 (1940) and *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). We do not find these cases applicable.

In *United States* v. *Falcone*, *supra*, the defendant, in the normal course of his business, sold quantities of sugar to certain persons knowing that it would be used in the illegal production of liquor. He was indicted for aiding and abetting the operation of illicit stills. In this court, Judge Learned Hand framed the question as follows: "whether the seller of goods, in themselves innocent, becomes * * * an abettor of the buyer because he knows the buyer means to use the goods to commit a crime." 109 F. 2d at 581. The court answered this question in the negative, holding that "[i]t is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its

outcome." *Id.* The Supreme Court affirmed. The difference between *Falcone* and the case at bar is manifest, since stolen bonds are assuredly not "goods in themselves innocent * * *" and appellants are not prosecuted for failure to "forego a normally lawful activity." The court in *Falcone* evidently thought it undesirable to charge a merchant with the unlawful use a customer may make of his product, although he may know of the unlawful use, when he is selling the goods he normally sells at the price he normally charges and he is not involved in the subsequent wrongdoing. See *United States* v. *Piampiano*, 271 F. 2d 273 (2d Cir. 1959). *Falcone* has been limited

> "to its strict facts—the case of a supplier of goods, innocent in themselves, who does nothing but sell those goods to a purchaser who, to the supplier's knowledge, intends to and does use them in the furtherance of an illegal conspiracy." (*United States* v. *Tramaglino*, 197 F. 2d 928, 930 (2d Cir.), cert. denied, 344 U. S. 864 (1952).)

It is clearly inapplicable to the case at bar.

In *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938), the defendant was charged with aiding and abetting the possession of a remote vendee of counterfeit money. In reversing the conviction the court relied on the fact that the principal, i.e. the individual whose possession defendant was charged with abetting, was not a vendee of the defendant. The court expressly left open the question whether the same result would obtain if the immediate vendee was charged with possession, a question closely analogous to that presented in this appeal.

Much closer to the facts presented by the case at bar than either *Falcone* or *Peoni* is *Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943). There, defendant, a wholesale drug company, sold large amounts of narcotic drugs to a physician with knowledge that he in turn was distributing a substantial portion of them illegally. The Supreme Court sustained a conviction of conspiracy with the physician to dispense drugs in violation of the Harrison Narcotic Act, 26 U. S. C. §§2553, 2554 (1946)* against an attack based on *Falcone*. The court distinguished *Falcone* primarily on the basis of the nature of the articles sold in the respective cases.

> "The difference is like that between toy pistols or hunting-rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade." *Direct Sales Co.* v. *United States, supra*, at 710.

The facts of the case at bar are even more strongly against appellants than those in *Direct Sales*, because here the initial possession by appellants was unlawful and the sales could not be legitimate regardless of the volume of the purchaser. The "element of personal law-breaking and clandestine selling," as well as the implicit conditioning of

---

* Now 26 U. S. C. §§4704, 4705 (1958).

future business of the same nature and at least part payment for past transactions on successful passing, "furnished the required 'stake in the success of the venture' that the *Falcone* case demanded." *United States* v. *Tramaglino*, *supra*, at 931. *United States* v. *Piampiano*, 271 F. 2d 273 (2d Cir. 1959) holds that *any* deviation from the strict facts of *Falcone*, even a lawful departure from the normal course of business or cooperation in concealing delivery, is sufficient to connect the vendor with the criminality of the vendee. Cf. *United States* v. *Russo*, 284 F. 2d 539, 541, n. 3 (2d Cir. 1960). Note, Falcone Revisited: The Criminality of Sales to an Illegal Enterprise, 53 Colum. L. Rev. 228 (1953).

We conclude that the evidence amply supports the charges of aiding and abetting against Coppolla and Sanantonio. The trial court's charge on the elements that constitute the crime of aiding and abetting was wholly in conformity with prevailing law.

Appellants Campisi, Coppolla and Sanantonio raise certain questions about the alleged undue length of the indictment, prejudicial joinder and the denial by the trial court of motions to sever. We do not reach the merits of these contentions because we hold that the objections were waived in the court below.

Rule 12 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (b) The Motion Raising Defenses and Objections.
>
> * * * * * *
>
> (2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction

> in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.
>
> * * * * * *
>
> (3) *Time of Making Motion.*
>
> The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Here the pleas were entered in November, 1961 and pursuant to Rule 12(b) (3) the district judge postponed the date on which motions under Rule 12(b) (2) were to be made until December 4, 1961. At that time no motions directed to the length of the indictment, joinder or severance were made. Under the express provision of 12(b) (2) the "[f]ailure to present [the] objection * * * constitutes a waiver thereof, * * * "

The appellants moved for severance on the morning the trial was scheduled to begin. No attempt to show cause justifying relief from the waiver was made except to point to the press of other engagements and the failure of predecessor counsel to make a timely motion. There was no claim that anything new bearing on the proper disposition of the question had been learned after the scheduled motion date. Indeed, in introducing the motion, which was later joined by counsel for Campisi and Coppolla, counsel for Sanantonio stated that the court would be fully justified in denying it as untimely. The record shows that the court

did exactly that. Therefore the objections are not properly before this court as they might have been if the lower court had granted relief from the waiver and denied the motion on the merits.

In order to prove the offense charged the government was required to establish that the bonds which were forged had been stolen, although it was not necessary to connect the defendants directly with the thefts. The appellants were willing to concede that the bonds were stolen, presumably in order to keep from the jury evidence of violent thefts which they thought might prejudice the jury against them on other issues. The government expressed its willingness to enter into a stipulation of this general nature, but the parties were not able to agree on the exact language. Campisi contends that the government was obligated to enter the stipulation and that it arbitrarily refused to do so with the result that much prejudicial evidence was needlessly paraded before the jury. A reading of the relevant portions of the transcript leaves much doubt that it was the government that refused to stipulate, but in any event the government had the right to present evidence that the bonds were stolen in the way it wished to present such evidence, not as appellants would have chosen to do so.

Appellants' remaining contentions are equally without merit. Since the conspiracy counts were amply proved and were dismissed only to simplify the issues, the declarations of the co-conspirators were admissible. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2d Cir. 1945). The government was within its rights in objecting to the false statement in the summation of counsel for Campisi that his client "has never been convicted of a crime in his life."

Cf. *United States* v. *Universita*, 298 F. 2d 365 (2d Cir.), cert. denied, 82 S. Ct. 1598 (1962). The court correctly charged on the treatment to be accorded the testimony of an accomplice and it was not error to refuse to repeat the point in the language suggested by the defense. It was not error to send to the jury the bonds that were the subject of counts that were later dismissed because no motion to strike them was made and because, as proof that Campisi had committed similar acts, they remained admissible to show his knowledge, motive and intent. *United States* v. *Bollenbach*, 147 F. 2d 199, 200 (2d Cir. 1944), rev'd on other grounds, 326 U. S. 607 (1946).

Affirmed.

APPENDIX B

Judgment—United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and sixty-two.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THOMAS BARTKOVSKY, et al.,
Defendants,

ANTHONY CAMPISI, EDWARD CARMINE COPPOLLA; ANTHONY J. DONATIELLO, ALFRED SANANTONIO,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Judgment—United States v. Coppolla

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr 978

UNITED STATES OF AMERICA

v.

EDWARD CARMINE COPPOLLA

On this 5th day of February, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully & knowingly falsely making, altering, forging and counterfeiting the endorsements of the registered owners & payees of U. S. Savings Bonds & uttering & publishing the same, knowing the same to be false, forged, altered & counterfeited.

(Title 18, Secs. 459 & 2, U. S. Code).

as charged in cts. 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, incl., & cts. 330 to 334, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix C—Judgment—United States v. Coppolla

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) Years on each of counts 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, inclusive and counts 330 to 334, inclusive, to run concurrently with each other.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Archie O. Dawson
United States District Judge.

Herbert A. Charlson
Clerk.

Appendix C

Judgment—United States v. Sanantonio

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr 978

UNITED STATES OF AMERICA

v.

ALFRED SANANTONIO

On this 5th day of February, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty by a jury of the offense of unlawfully, wilfully & knowingly falsely making, altering, forging and counterfeiting the endorsements of the registered owners & payees of U. S. Savings Bonds & uttering & publishing the same, knowing the same to be false, forged, altered & counterfeited.

(Title 18, Secs. 495 & 2, U. S. Code);

as charged in cts. 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, incl., & cts. 330 to 334, inclusive and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Appendix C—Judgment—United States v. Sanantonio

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS on each of counts 153 to 156, inclusive, 309 to 312, inclusive, 325 to 329, inclusive and counts 330 to 334, inclusive, to run concurrently with each other.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

ARCHIE O. DAWSON
United States District Judge.

HERBERT A. CHARLSON
Clerk.

APPENDIX D

STATUTES AND RULES INVOLVED

TITLE 18, U. S. CODE

§ 495. *Contracts, deeds, and powers of attorney*

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

TITLE 18, U. S. CODE

§ 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

TITLE 18, U. S. CODE

371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 8.

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions

connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 12.

Pleadings and Motions Before Trial; Defenses and Objections

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institu-

tion of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be con-

tinued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

Rule 14.

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1962

EDWARD CARLTON CRUTCHER AND ALFRED SANABRIA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
WILLIAM H. ORRICK, JR.,
GEORGE M. FREE,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 383

EDWARD CARMINE COPPOLLA AND ALFRED SANANTONIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (II R. 313–321;[1] Pet. App. 2–10) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (II R. 322). On August 21, 1962,

[1] "II R." designates the government's appendix in the court of appeals which contains excerpts from the trial testimony and to which have been added the proceedings in the court below. "I R." refers to the separately paginated "Appendix to Appellants' Briefs" in the court of appeals containing, *inter alia*, the indictment and the trial court's instructions. Also on file with the Clerk of this Court is the complete trial transcript, which, when referred to herein, is designated "Tr."

Mr. Justice Harlan extended the time for the filing of a petition for a writ of certiorari to and including August 29, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are 18 U.S.C. 2(a) and 495, and Rules 8 and 14 of the Federal Rules of Criminal Procedure. They are printed in the appendix, *infra*, pp. 17–18.

QUESTIONS PRESENTED

1. Whether the number and nature of counts in the indictment and the joinder of offenses and parties fatally prejudiced petitioners, where the charges against them which were submitted to the jury consisted of a limited number of the substantive counts, as to which the evidence was compartmentalized in the government's case and segregated in the trial court's charge.

2. Whether the evidence supported petitioners' convictions as aiders and abettors in the forging of endorsements on government bonds and the uttering of such bonds.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on 18 counts charging that they aided and abetted the forging of endorsements on nine Series E United States Saving Bonds and the uttering of these forged instruments in violation of 18 U.S.C. 495 (Appendix, *infra*, pp. 17–18). (Tr. 1203–1204). Each petitioner was sentenced to imprison-

ment for eight years on each of the 18 counts, the sentences to run concurrently (Tr. 1233–1234, 1253–1254; Pet. App. 12–15). The court of appeals unanimously affirmed the convictions (Pet. App. 2–10).

Because petitioners complain about the length of the indictment and the joinder of defendants and offenses, we describe the scope and theory of the indictment and the pre-trial and trial proceedings relating thereto before turning to a discussion of the evidence.

I. THE INDICTMENT AND THE DISMISSAL OF COUNTS

1. The indictment, in 538 counts, charged the forging and uttering of forged endorsements on each of 269 Series E United States Savings Bonds and, in two counts (539–540), conspiracies to commit these substantive offenses (I R. 9–63). Each of the 269 bonds was the subject of two separate substantive counts—one charging forgery and the other uttering of the forged instrument. In substantive counts 1–334 petitioners were charged with aiding and abetting Levine, a co-defendant charged with forging and uttering the bonds.[2] Donatiello was also named as aider and abettor in counts 1–324, and Parks was named as an additional principal in counts 313–334. The remaining substantive counts charged bond cashings involving Donatiello, Anthony Campisi and

[2] These counts of the indictment charged the petitioners with forging and uttering the bonds (18 U.S.C. 495) as well as aiding and abetting the commission of that crime (18 U.S.C. 2), (see Appendix, *infra*, pp. 17–18). Subsequently, the government filed a bill of particulars which stated that petitioners were charged in the substantive counts only as aiders and abettors (I R. 64a).

Thomas Bartkovsky (I R. 38–57, 64).[3] Count 539 charged a conspiracy among petitioners, Donatiello, Levine and Parks to forge and utter Series E Bonds (I R. 57–60), and count 540 charged a like scheme among Donatiello, Bartkovsky and Campisi (I R. 61–63).

2. On the morning set for the commencement of the trial (January 2, 1962) and before the jury was impanelled, petitioners moved for severance, asserting that they would suffer prejudice at trial because of the length of the indictment and the joinder of counts in which petitioners were not named (II R. 2–4; see also II R. 9–10). In making this motion counsel for petitioner Sanantonio acknowledged, however, that the court would be "perfectly justified" in denying it as not timely filed (II R. 2–3). The Assistant United States Attorney, in opposition, noted the untimeliness of the motion (II R. 4),[4] and further argued that the joinder was permissible because "at least in one important instance, the same bonds, and the same burglary, appear in the hands of both sets of conspirators" (II R. 4–5),[5] that "[m]any of the acts are simi-

[3] Donatiello was named in counts 335–404, Campisi in counts 405–538 and Bartkovsky in counts 335–538. On October 19, 1962, Campisi filed a petition for a writ of certiorari. The government is presently preparing a response thereto.

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charged in different substantive counts with aiding and abetting the forging and uttering of some of these bonds. Compare counts 153 through 156 (I R. 9, 29) with counts 358 through 362 (I R. 38, 42–43).

[6] Counts 153–156, 309–312, 325–334. Thirty-four substantive counts were submitted to the jury as to Campisi (counts 455–471, 522–538) and 332 as to Donatiello (counts 1–324, 335–338, 370–373).

[7] Donatiello and Campisi were also convicted on all the counts submitted to the jury against them (Tr. 1203–1204). Donatiello was sentenced to a concurrent nine year prison sentence on each count (Tr. 1260), and Campisi was sentenced to a concurrent eight year sentence on each count (Tr. 1231–1232).

II. THE EVIDENCE

1. The evidence at the trial showed that large quantities of stolen United States Series E Bonds were illegally cashed between May 1960 and January 1961.

In April or May 1960, Herbert Levine joined with "Blotchie" Donatiello in a bond-passing operation (II R. 64–69). According to Levine, the procedure which was agreed upon and thereafter followed was for him to meet with Donatiello who would give him Series E Bonds to be passed and also a blank New York State driver's license with a forged validating stamp. Levine would insert his own physical description on the license and sign the name of the registered owner of the bonds to be passed that day. The two men would then usually drive to a small town outside of New York City and select a local address which would also be entered on the license. Levine would then enter a local bank, forge the registered owner's name on the bonds and present them for payment. If necessary he would use the forged driver's license as identification. He received twenty-five per cent of the profits from the cashed bonds, giving the remainder to Donatiello (II R. 62–64, 68–71, 74–77, 83–84).[8] In July 1960, Levine brought Meyer Parks into the operation as a bond-passer. Parks also received a percentage of the profits from the bonds he successfully cashed (II R. 80–86, 126–135).

[8] During the summer of 1960, Levine, using the above described procedure, cashed numerous bonds belonging to some four individuals (II R. 63, 72–73). These owners testified that these bonds had been stolen from them; that they had never signed nor endorsed them; and that they had never authorized any one to endorse or cash the bonds for them (II R. 13–19; 26–30; 31–35; 35–39).

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 383

EDWARD CARMINE COPPOLLA AND ALFRED SANANTONIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (II R. 313–321;[1] Pet. App. 2–10) is not yet reported.

JURISDICTION

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[8] During the summer of 1960, Levine, using the above-described procedure, cashed numerous bonds belonging to some four individuals (II R. 63, 72–73). These owners testified that these bonds had been stolen from them; that they had never signed nor endorsed them; and that they had never authorized any one to endorse or cash the bonds for them (II R. 13–19; 26–30; 31–35; 35–39).

2. At a point in the summer of 1960 when they "had no bonds to cash" (II R. 87, 135), Donatiello told Levine that he knew of a place where they might get some and took Levine to a flower shop in Brooklyn. At the shop, Levine met petitioner "Freddie" Sanantonio (II R. 87–91). No bonds were then obtained, although Donatiello informed Levine that he had been advised that they would be able to get some in the near future (II R. 92). Accompanied by Donatiello, Levine made a number of further visits to the flower shop where he also met petitioner "Eddie" Coppolla (II R. 92–93). During these visits all four men discussed the availability of bonds (II R. 93). On one of these visits, Coppolla stated that he had "verified the fact that they should have some bonds soon" (II R. 94).

Thereafter, at a meeting attended by all four at the flower shop at the end of October or in early November 1960, either Sanantonio or Coppolla stated that a large amount of bonds would be available "in a couple of days" (II R. 94–97). A few days later, Levine and Donatiello returned to the flower shop and were told that some bonds belonging to a doctor, in the amount of $83,000, would be available that day (II R. 97–98, 100). Following this conversation, the four men got into a car and drove off. They soon parked and Sanantonio left the car. He returned in about 15 minutes with an envelope containing bonds registered to Dr. Sam X. Fankuchen, in the amount of $20,000 or $40,000 (II R. 102) (Dr. Fankuchen testified that on October 28, 1960, $83,000 worth of his Series E Bonds had been stolen from his Brook-

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lyn home) (II R. 44–46, 55–56). Either Donatiello or Levine then gave money to the petitioners (II R. 102–103). The four men had previously discussed the cost of the bonds and it had been agreed that petitioners would get twenty-five or thirty per cent "of what the bonds would bring back" (II R. 105–106).

About two or three weeks later (late November 1960), the four met again, this time in Manhattan (II R. 106–107).[5] This time petitioners gave Levine and Donatiello approximately $20,000 worth of Fankuchen bonds and, in return, received either $1,700 or $2,700. This payment came from money which Levine and Donatiello had received from previous bond cashing (II R. 106–110). Thereafter, Levine met alone with Coppolla at this same location and received some more Fankuchen bonds in exchange for an additional payment (II R. 110). Some time afterward, Donatiello told Levine that the Fankuchen bonds were too difficult to cash and that he was going to return $23,000 worth (II R. 111). In late December 1960, or early January 1961, Levine had a conversation with Sanantonio, and it was agreed that he could purchase the $23,000 of Fankuchen bonds. By prearrangement Levine subsequently met with Coppolla in a wholesale meat market area in Brooklyn, and purchased these bonds (II R. 111–113).

Levine further testified that he received forged New York drivers' licenses used in cashing bonds from "Blotchie or Eddie" (II R. 115).

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[5] This meeting took place at 10 or 11 p.m. in an automobile parked at Third Avenue and 49th Street (II R. 107).

3. On November 14, 1960—some seventeen days after the theft of the Fankuchen bonds—three (in $1,000 denominations) were cashed by Parks, accompanied by Donatiello, in Middletown, New York (II R. 138–139; counts 325–327, 330–332). Two days later, Levine cashed four Fankuchen bonds (totalling $3,500) in Tarrytown, New York (II R. 59–62; counts 153–156; 309–312). Between January 23 and 25, Parks cashed two other Fankuchen bonds (in $1,000 denominations) in a bank in New York City (II R. 115–117, 118–119, 139; counts 328–329; 333–334).

Dr. Fankuchen, who had testified that his bonds had been stolen on October 28, 1960 (see *supra*), stated that he had not endorsed them or authorized anyone to sign his signature and cash them (II R. 57).

4. As to the defendants other than petitioners, the evidence showed that Bartkovsky at first worked together with Donatiello and Campisi, the latter two acting as partners in suppying him with bonds for the bond passing operation (II R. 178–187). Bartkovsky used the same bond-passing techniques as employed by Levine and Parks (II R. 181–182, 186). Some time in June 1960, Campisi and Donatiello broke up. Bartkovsky thereafter worked with each separately—primarily with Campisi but on occasion with Donatiello (II R. 187–188, 200–201). During this latter period both Campisi and Donatiello separately gave Bartkovsky stolen Fankuchen bonds to cash (II R. 203–205, 209–210).

III. THE TRIAL COURT'S INSTRUCTIONS

After instructing, *inter alia*, that the jury was the exclusive judge of the facts (I R. 162), that the government had the burden of establishing guilt beyond a reasonable doubt (I R. 163–164), and detailing the nature of the offenses charged in the indictment (I R. 165–166), the court observed that in order to convict any one of the defendants as an aider and abettor, the jury had to find that he wilfully associated himself "in some way with the criminal venture; and that he wilfully participate[d] or assist[ed] in it as in something he wishe[d] to bring about; and that he wilfully [sought] by some action of his to make it succeed" (I R. 166). The court, after noting that it was going to "discuss and consider each defendant separately" (I R. 165), then proceeded to marshal the evidence as to each defendant by the count (I R. 168–177), observing in this connection that petitioners were charged "with violation of law only in connection with bonds standing in the name of Dr. Fankuchen" (I R. 174). It then described the evidence adduced by the government on these transactions as they related to petitioners (I R. 175–176) and the other defendants (I R. 168–174; 176–177). The court further charged the jury that they were called upon "to determine the guilt or innocence of the different defendants under the different charges of the indictment" and that such guilt "must be determined individually" (I R. 164).

ARGUMENT

Stressing the length of the indictment, the joinder of defendants and offenses, and the ultimate dismissal

of the two conspiracy counts, petitioners allege that they were denied a fair trial. The facts are, however, that, so far as petitioners are concerned, only 18 counts relating to the forging and uttering of nine bonds stolen from one person were submitted to the jury; that the government, in presenting its case to the jury, separated the evidence relating to petitioners and their confederates (Donatiello, Levine and Parks) from the evidence dealing with parallel bond-cashing arrangements involving Donatiello, Campisi and Bartkovsky; that the trial judge gave instructions which segregated and pinpointed the evidence on the counts involving petitioners; and that the proof of petitioners' guilt was clear, direct and unequivocal.

So far as the alleged confusion is based on the mere length of the indictment, it is without merit. The indictment was long because each bond was the subject of two counts (one for forging and one for uttering) and many bonds were cashed, but there is nothing inherently complicated in the mere fact that a substantial number of bonds were involved.

Nor did the fact that two different groups of men were involved, necessitating two different conspiracy counts, require the conclusion that there should be a severance. The two conspiracy counts—one involving petitioners, Donatiello, Levine and Parks and the second Donatiello, Campisi and Bartkovsky—had one common defendant and charged parallel schemes, involving the same techniques and purposes and occurring generally during the same time period (I R. 57–63). Rule 8 of the Federal Rules of Criminal Procedure (Appendix, *infra*, p. 1a) allows for a

joinder of offenses of the "same or similar character" and of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions * * *." As a preliminary matter, therefore, the joinder was proper. See *Schaffer* v. *United States*, 362 U.S. 511, 514. There was no reason why, on the basis of the indictment alone, the court should have severed the case against petitioners. Indeed, none of the petitioners made any pre-trial motions challenging the indictment or requesting severance until the morning set for the commencement of trial, more than a month after the date fixed by the district court for the making of such motions (II R. 2–10).

At the conclusion of the government's evidence, the trial judge decided that some simplification was desirable and dismissed the conspiracy counts. With respect to petitioners, only 18 counts pertaining to nine bonds taken from one person were submitted to the jury. There was no reasonable possibility of confusion. The evidence was developed at trial in a compartmentalized and easily separable fashion. The government's case, in essence, consisted of the testimony of the various bondholders who identified their stolen bonds and stated that they had never endorsed or cashed them or authorized any others to do so (see, *e.g.*, II R. 13–19; 26–30; 31–35; 35–39; 44–46; 55–57) and the testimony of Herbert Levine (II R. 62–115), Meyer Parks (II R. 126–143), and Thomas Bartkovsky (II R. 176–192, 200–206; 209–221, 223–226). Levine and Parks testified to their association with

Donatiello (commencing in the summer of 1960) in the bond-passing operation, listed the various bonds that they passed, and detailed the techniques they employed. Levine then described his various meetings with petitioners, starting in the summer of 1960 and culminating in the purchases from them of the Fankuchen bonds. Finally, Bartkovsky testified to the discrete bond-passing arrangement with Donatiello and Campisi and identified the bonds that were passed by this group (see Statement, *supra*, pp. 5–9). In short, the evidence implicating petitioners basically came from a single witness (Levine),[10] related to a single series of bonds, and encompassed a fairly limited period of time. Moreover, the trial judge in his instructions to the jury further segregated the proof, setting out separately by the count, the evidence as to each defendant (I R. 168–177), and advising the jury that "[t]he guilt or innocence of each defendant must be determined individually * * * on each count of the indictment which still remains" (I R. 164). In the circumstances, there is no reason to suppose that the jury failed to follow the trial court's admonition. Cf. *Delli Paoli* v. *United States*, 352 U.S. 232, 239; *Opper* v. *United States*, 348 U.S. 84, 94–95.

[10] Petitioners raise as a question (Pet. 3) but do not argue the claim that the court should have required corroboration of accomplice testimony. The rule in the federal courts has long been otherwise. *Caminetti* v. *United States*, 242 U.S. 470, 495. The trial judge instructed the jury that such testimony was to be "received with caution and weighed with great care" and that the jury should not convict "upon the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt" (I R. 178).

Petitioners suggest, however, that inadmissible evidence must have been considered by the jury against them because, although both conspiracy counts were dismissed, all of the evidence relating to these counts remained in the case (Pet. 11–12, 14). Yet, at no time during trial or after dismissal of the conspiracy counts did petitioners seek relief from the joinder by a motion under Rule 14 of the Federal Rules of Criminal Procedure (Appendix, *infra*, p. 1b). Nor did they object to those portions of the charge in which the court marshalled the evidence as to each defendant. Cf. *Schaffer* v. *United States*, 362 U.S. 511, 516. Moreover, they make no showing of prejudice now. As for the evidence relating to the Campisi-Donatiello-Bartkovsky conspiracy, it was made clear both in manner of presentation and by express statement that such evidence, except to the extent that it might be independently admissible against petitioners, could not be considered against them (see, *e.g.*, II R. 161, 166, 171, 184, 192–194, 207–208, 229–230). As for evidence relating to the acts and statements of petitioners' alleged co-conspirators (Donatiello, Levine and Parks) in perpetrating the scheme to pass the stolen Fankuchen bonds, it is to be noted that much of it related to direct contacts and negotiations between Donatiello and Levine on the one hand and petitioners on the other (see Statement, *supra*, pp. 6–8). Such evidence was unquestionably admissible against petitioners. The evidence relating to the activities and statements of Donatiello, Levine and Parks outside the presence of petitioners in carrying

out the Fankuchen bond passing operation was equally admissible against petitioners on the substantive counts involving these bonds, without the aid of either of the conspiracy counts.[11] For the Fankuchen bond-passing scheme was plainly a joint-venture in which all five actively participated. Accordingly, the rules of evidence would have been the same—*i.e.*, the activities and statements of their joint-venturers in furtherance of this scheme would have been admissible against petitioners—even if no conspiracy had been charged. See *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9). In short, petitioners were accorded a fair trial and convicted on ample evidence, all of which was clearly admissible against them on the substantive counts alone.

2. There is no merit in the claim that the evidence failed to show that petitioners were aiders and abettors in the forging and uttering of the Fankuchen bonds. Even before the bonds were stolen petitioners discussed with Levine and Parks the availability of bonds. Petitioners could hardly have had any doubt

[11] On a number of occasions the statements made in these early dealings were limited to the utterer and held not to be binding on petitioners (see, *e.g.*, II R. 67, 69, 81–82). In any event, the evidence showed a concerted plan illegaly to cash stolen government obligations. That petitioners may have entered into this arrangement after it had commenced, or that Parks had no direct contact with petitioners, does not change the fact that they all had embarked and participated in the common scheme. See *Blumenthal* v. *United States*, 332 U.S. 539, 556–558; *United States* v. *Tramaglino*, 197 F. 2d 928, 930 (C.A. 2), certiorari denied, 344 U.S. 864; *United States* v. *Sansone*, 231 F. 2d 887, 893 (C.A. 2), certiorari denied, 351 U.S. 987.

even then about the purpose for which the bonds were sought (*i.e.*, to sell them), a purpose which necessarily involved forgery. Shortly after the theft,[12] petitioners on four separate occasions sold thousands of dollars worth of bonds at a price estimated at a percentage "of what the bonds would bring back" (II R. 105–106). The jury could reasonably conclude that petitioners knowingly entered into the business of supplying stolen bonds to be forged; that they were aware that their "business" would last only so long as the purchasers could successfully forge and utter the bonds and that their acts of selling were directed to this illegal end. Whatever may be the outer limits of liability under the aider and abettor doctrine as applied to one who merely sells an innocent object which he knows may be put to an illegal use, no such problem is involved in this case. The evidence here clearly and directly involved petitioners in the criminal conduct of which they were convicted. See *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709–714; *United States* v. *Tramaglino*, 197 F. 2d 928, 930–931 (C.A. 2), certiorari denied, 344 U.S. 864; *United States* v. *Russo*, 284 F. 2d 539, 541 (C.A. 2); *United States* v. *Piampiano*, 271 F. 2d 273, 274–275 (C.A. 2). Petitioners made the venture their own under the strict standard of *United States* v. *Falcone*, 109 F. 2d 579, 581 (C.A. 2), affirmed, 311 U.S. 205; they meant "to further,

[12] Dr. Fankuchen testified that the theft occurred on October 28, 1960 (II R. 44–46, 55–56). Parks first cashed Fankuchen bonds on November 14, 1960 (II R. 138–139) and Levine on November 16, 1960 (II R. 59–62).

promote and coope[illegible] in it," under the rationale of *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711.[13]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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Solicitor General.
HERBERT J. MILLER, JR.,
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Attorneys.

OCTOBER 1962.

[13] There is no merit to petitioners' contention, advanced in the statement of the Questions Presented (Pet. 2-3), that the court lacked jurisdiction of the aiding and abetting charges against petitioners because the transactions were not shown to have taken place in interstate commerce. Whatever the proof showed as to the interstate nature of the crimes, it was sufficient to afford jurisdiction of the charges of aiding and abetting the forging and uttering of United States Savings Bonds in violation of 18 U.S.C. 495, which is clearly a federal crime.

APPENDIX

18 U.S.C. 2 provides in pertinent part:

§ 2. PRINCIPALS.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

* * * * *

18 U.S.C. 495 provides:

§ CONTRACTS, DEEDS, AND POWERS OF ATTORNEY.

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Rule 8 of the Federal Rules of Criminal Procedure provides:

JOINDER OF OFFENSES AND OF DEFENDANTS

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

RELIEF FROM PREJUDICIAL JOINDER

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

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PETITIONERS' JOINT REPLY BRIEF

This joint reply brief is filed on behalf of all of the petitioners in the two above entitled proceedings (Nos. 383 and 538), the petitions being companion and the petitioners in both causes being represented by the same counsel.

1. Surprisingly, the Government's main thrust in its briefs in opposition in both of these proceedings seems to

be aimed at showing that the evidence as to the alleged guilt of each of the petitioners was sufficient. This is surprising because, although petitioners surely do not concede their guilt, their respective prayers for certiorari herein are not made on the basis of any such issue of sufficiency of the evidence but on issues of fair trial—indeed we are not aware that, except in the so-called "no evidence" type of case, persons seeking certiorari in this Court or the Government in opposing certiorari are properly supposed to argue the sufficiency of the evidence in criminal cases. It is true that the petitioners herein have tendered the issue of whether the Trial Court's dismissal of the conspiracy counts was merely to "simplify" the case for the jury or whether it rather reflected the trial Court's dissatisfaction with the Government's conspiracy proofs. However, in tendering this latter issue as to the conspiracy counts we were explicit, we had thought, that our purpose in doing so was to call attention to the aggrieving incidents of unfair trial which thereby arose, i.e., in that the proofs under the dismissed conspiracy counts were permitted to remain in the case and to be considered by the jury. Typical of the Government's preference to pitch its opposition to both of the instant petitions on the issue of sufficiency of the evidence rather than on the issue of fair trial, are the following two examples in the Government's respective two briefs in opposition herein: (1) In its brief in No. 383 (*re* petitioners Coppolla and Sanantonio), at page 8, the Government says "Levine further testified that he received forged New York driver's licenses used in cashing bonds from 'Blotchie or Eddie' (II R. 115)." In view of the importance of the issue which petitioners have raised in No. 383 as to whether they were fairly convicted of aiding and abetting, such testimony

by the accomplice Levine would be admittedly serious as showing that "Eddie" (Coppolla) had done more than merely supply bonds to the alleged forgers and utterers. However, this supposed testimony of Levine was actually all but worthless, because, as plainly appears in the Government's appendix in the Court below at pp. 113a to 115a, Levine had specifically testified that he had obtained such driver's licenses not from Coppolla but from Donatiello ("Blotchie"), and then later testified (after repetitious further questioning by the prosecutor amounting to importunity) that he did not remember whether he got them from Coppolla or Donatiello. (2) In its brief in No. 538 (*re* petitioner Campisi), at p. 18, fn. 20, the Government's reply to our demonstration that the counts of the indictment involving the "Lacorte" bonds should not have been submitted to the jury against Campisi, is that "there is no occasion for this Court to consider this contention" because Campisi's concurrent sentence "is wholly supportable on any of the substantive Counts which have undisputable support in the evidence". This argument by the Government quite overlooks our basic contention that the trial of this case under the extraordinary 540-Count indictment inevitably generated to confusion and error to the fatal prejudice of the petitioners and that the entire case, not just the proof as to one count or another, was permeated with this vice. Other examples of the Government's efforts to alter the perspective of this case from one of fair trial to one supposedly involving nothing more than issues as to sufficiency of the evidence, are noted in subsequent paragraphs herein.

2. Twice in its brief in No. 538 (*re* petitioner Campisi) (p. 6, fn. 8; p. 13, fn. 14), the Government asserts that the

Trial Court's dismissal of the substantive counts as to Campisi involving the "McKeon" bonds was the result of the Trial Court's erroneous interpretation of the testimony. The testimony at Tr. 799-803, 807, 868, 1003 shows that the Trial Court agreed with Campisi's counsel that Bartkofsky had testified he obtained the bonds involved in these counts from Donatiello, not Campisi, the Trial Court stating that his written notes so indicated, as did also the written notes of Campisi's attorney, Mr. Bozza. We have checked Bartkofsky's testimony on this point, and we must be candid in informing this Court that the stenographer's notes do not unequivocally either support or negate the recollection of the Trial Court and Mr. Bozza. During the direct examination of the accomplice witness Bartkofsky, as likewise during the examination of the other accomplice witnesses, the prosecutor was continually showing various bonds to the witnesses, and from time to time, just as was, inevitably to be expected under this monster indictment, the witnesses' responses stand upon the stenographic record ambiguously as regards any attempt to pin those responses into precise connection with particular bonds. This confusion in the testimony was aggravated by the Government's intermingling of its substantive and conspiracy proofs, with various bonds from among the hundreds in the case being shown to witnesses and offered in evidence. A prime example of this confusing method of "proof" is found in the Bartkofsky testimony at Tr. 624-632. It is impossible to determine from the stenographic transcript just which bonds Bartkofsky was referring to when he said at Tr. 632 that he got certain bonds "from Campisi", although on the preceding page (Tr. 631) the witness was apparently being questioned about the bonds involved in forgery counts 405 to 454 (the "Lacorte" bonds).

3. In its brief in No. 538 (*re* petitioner Campisi), at pp. 6-7, the Government sets forth in detail the trial proofs concerning the alleged New Jersey transactions of Bartkofsky, Donatiello and Campisi. By this extensive treatment the Government is evidently seeking to focus the Court's attention on these alleged New Jersey episodes, which were important to the Government's case at the trial because they supposedly depict Campisi as a prime conspirator at an early stage of the alleged conspiracy. However, the Government's extended treatment of this phase in its brief in No. 538, as cited *supra*, apparently overlooks our demonstration at pp. 11-12 of the Campisi Petition herein that this entire phase of the Government's trial proofs turned out to be abortive and that the prosecutor himself apparently agreed to drop this phase of the case against Campisi. In treating this phase in the Campisi Petition herein our theory had been that it was one of the numerous instances to which we were calling attention for the purpose of showing that the inevitable confusions attending this extraordinary prosecution resulted in the denial of a fair trial. The Government's preoccupation, on the other hand, as we have above suggested, seems to be not with this issue of fair trial, but with the issue of the sufficiency of the evidence—so much so that, in the instance just mentioned, the Government's very presentation before this Court takes on a quality of inaccuracy. We hasten to add that we do not for one moment consider this inaccuracy to be deliberate on the part of the Government in its presentation before this Court, but it does show, we think, how difficult it is even for the able attorneys of the Solicitor General's staff to thread their way through this labyrinthine record. How much more difficult must this task have been for the trial jury in this case.

4. On the other hand, in still another instance in its brief in No. 538 (*re* petitioner Campisi), at p. 8, fn. 11, the Government has apparently traced a more sure-footed pathway through the record than has been done by anyone else who has had contact with the case before. In the footnote just cited the Government assembles record facts which point to the conclusion that, in addition to the counts submitted to the jury against Campisi which we have showed should not have been so submitted, it was likewise error to submit to the jury counts 468-471 and 535-538 (the "Raccuia" bonds).

5. While the Government has especially emphasized (throughout both of its briefs) the alleged numerous linkages in the proofs as between the various defendants, it has also argued in a seemingly opposite vein. We refer to the Government's argument, in both of its briefs in opposition herein, that this was really a very simple case in which the proofs as to the various defendants were effectively segregated by the prosecution and the trial Court for the benefit of the jury. Even without the numerous demonstrations which we believe we have made to the effect that the proofs under this 540-count indictment descended upon the jury's minds with a stupefyingly confusing impact, the Government's own contentions before this Court that the various alleged conspiratorial linkages were developed by the Government's trial proofs tend strongly to negate the Government's other argument that the case was a simple one and easily segregated as to the various defendants. Perhaps the strongest single indication that the Government is (to put it mildly) over-optimistic in its assertions before this Court that the case was thus easy to segregate, is the fact that (quite contrary to the Govern-

ment's repeated assertions in its two briefs herein) the Trial Court's charge to the jury wherein that Court supposedly did an adequate job of "segregating" the proofs as to the several defendants is actually a jury charge of the most perfunctory sort when judged by the tests of what should be contained in such a marshalling of evidence for a jury in a criminal case, particularly in a case so confusing as this one. The Trial Court's entire charge on this phase, which the Government repeatedly praises as some kind of model of segregated marshalling of evidence, appears at pp. 167-177 of the defendants' printed appendix in the Court below.

CONCLUSION

For the reasons presented in this joint reply brief, and in the two respective petitions herein, a writ of certiorari should issue in both Nos. 383 and 538.

Respectfully submitted,

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PETITIONERS' JOINT PETITION FOR REHEARING OF DENIAL OF WRITS OF CERTIORARI

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PETITIONERS' JOINT PETITION FOR REHEARING OF DENIAL OF WRITS OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray this Court to grant a rehearing of their respective petitions for writs

of certiorari in this case. The respective petitions for certiorari were denied by this Court on December 3, 1962. The ground for this joint petition for rehearing is as follows:—

On or about November 21, 1962, counsel for petitioners received the Government's Brief in Opposition in No. 538. The office of the Clerk of this Court by telephone had previously informed petitioner's counsel that the papers in these petitions for certiorari in both Nos. 383 and 538 would not be distributed to this Court until after the filing of the Government's Brief in Opposition in No. 538, and that the reply brief for the petitioners in both of said Dockets could be filed as a joint reply brief which could await the filing of the Government's Brief in Opposition in No. 538. On or about November 23, 1962, petitioner's counsel was advised, upon telephone inquiry to the office of the Clerk of this Court, that the papers in both Dockets would be distributed to the Justices on November 28, 1962. Not anticipating that the Court would reach these cases for conference until the next following Friday (December 7, 1962) at the earliest, i.e., not anticipating that these cases would be reached for conference within two days (Friday, November 30, 1962) after distribution of the papers to the Justices (which, as aforesaid, was to occur on November 28, 1962), petitioner's counsel filed a joint reply brief which reached this Court Saturday morning, December 1, 1962. The Court had, however, evidently taken up these cases in conference on the preceding day, Friday, November 30, 1962, for the orders denying certiorari were announced on Monday, December 3, 1962. On this last mentioned date an associate of petitioner's counsel happened to visit for another purpose the office of the Clerk of this

Court, where we were orally informed that our joint reply brief herein which had been received by the Clerk Saturday morning, December 1, 1962, had been distributed to the Justices. Since such distribution occurred, therefore, subsequent to the Court's Friday conference of November 30, 1962, and since our joint reply brief contains what are believed to be important matters favoring the grant of certiorari herein, and since we are unaware whether in circumstances of this kind the Court follows a supplemental conference procedure between the Friday and the Monday of a decisional weekend, we are respectfully presenting this joint petition for rehearing in the hope that additional consideration of these cases *via* the possibility of a supplemental conference distinctly referring to our above mentioned unanticipatedly late-filed joint reply brief, may cause the Court to grant our respective petitions for certiorari.

WHEREFORE, petitioners respectfully pray that this joint petition for rehearing should be granted, and that the respective petitions for writs of certiorari in Nos. 383 and 538 should be granted.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioners

Dated: December 14, 1962

[Certificate of Counsel follows on next page]

Certificate of Counsel

I hereby respectfully certify that the foregoing joint petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to what appears to counsel to be one of the grounds specified in Rule 58(2), to wit, an intervening circumstance of substantial effect, namely, the procedural circumstance of the time of the filing of petitioner's joint reply brief as recited in the foregoing joint petition for rehearing.

JEROME LEWIS
Attorney for Petitioners

Dated: December 14, 1962